William Jacks & Co (M) Sdn Bhd v S Balasingam

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–04–102 OF 1995

GOPAL SRI RAM, ABU MANSOR ALI AND DENIS ONG JJCA

12 MAY 1996

Administrative law *— Remedies — Certiorari — Application for certiorari to quash award of Industrial Court — Whether application frivolous and vexatious — Whether applicant raised prima facie case that Industrial Court in making award acted unlawfully or ultra vires its power*

The respondent was employed by the appellant as a bill collector in January 1978. In October 1989, the appellant wrote to the respondent informing him that he was being retrenched and offering retrenchment benefits of about RM27,000. The respondent did not accept the offer. He claimed that the retrenchment was a dismissal disguised as being a redundancy exercise. The respondent lodged a complaint with the Director General of Industrial Relations under s 20(1) of the Industrial Relations Act 1967. The respondent's representations were referred to the Industrial Court. The issue before the court was whether the respondent had been dismissed without just cause or excuse or whether his discharge was within the exercise of bona fide managerial power vested in the appellant as employer. The Industrial Court, after hearing evidence of several witnesses came to the conclusion that the respondent was victimized for his trade union activities. The appellant applied to the High Court for an order of certiorari to quash the award of the Industrial Court. The High Court dismissed the application. The appellant appealed.

Held, dismissing the appeal:

(1) The complaints made by the appellant amount to a criticism of the findings of fact made by the Indusrial Court based upon the credibility of the witnesses it saw and heard. It is well-settled that a court cannot utilize certiorari proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact; *Basappa v Nagappa* AIR 1954 SC 440, *Dharangadhra Chemical Works Ltd v State of Saurashtra & Ors* AIR 1957 SC 264 followed (see p 4C–D, E).

(2) Having carefully read the award of the Industrial Court, the court was satisfied that the tribunal did not traverse beyond the ambit prescribed by writ by the principles established by the decisions of the superior courts specifying its role in this area of human activity. The Industrial Court had asked itself the right question, took into account relevant facts and excluded from its purview all irrelevant consideration (see p 5A–B).

[Bahasa Malaysia summary

Responden telah digaji oleh perayu sebagai pemungut bil pada bulan Januari 1978. Pada Oktober 1989, perayu telah menulis kepada responden memberitahunya bahawa beliau telah diberhenti kerja dan menawarkan pampasan berhenti kerja lebih kurang RM27,000. Responden tidak menerima tawaran tersebut. Beliau mendakwa bahawa pemberhentian kerja tersebut adalah suatu pemecatan yang disamar sebagai situasi lebihan pekerja. Responden telah membuat aduan kepada Ketua Pengarah Perhubungan Perusahaan di bawah s 20(1) Akta Mahkamah Perusahaan 1967. Representasi responden telah dirujuk kepada Mahkamah Perusahaan. Isu di hadapan mahkamah adalah sama ada responden telah dipecat tanpa sebab yang adil dan saksama atau sama ada pelepasannya adalah di dalam perjalanan bona fide kuasa pengurusan yang telah diberikan kepada perayu sebagai majikan. Mahkamah Perusahaan, selepas mendengar keterangan beberapa orang saksi-saksi telah mencapai kesimpulan bahawa responden tersebut telah dijadikan mangsa kerana aktiviti-akiviti kesatuan sekerja. Perayu telah memohon kepada Mahkamah Tinggi untuk suatu perintah ceriorari untuk membatalkan award Mahkamah Perusahaan. Mahkamah Tinggi telah menolak permohonan tersebut. Perayu telah merayu.

Diputuskan, menolak rayuan tersebut:

(1) Aduan yang dibuat oleh perayu adalah terjumlah kepada kritikan penemuan fakta yang dibuat oleh Mahkamah Perusahaan berdasarkan kebolehpercayaan saksi-saksi yang ia lihat dan dengar. Ia adalah tidak dipertikaikan bahawa suatu mahkamah tidak boleh menggunakan prosiding certiorari sebagai suatu mantel untuk melayan, apa yang sebenarnya, adalah suatu rayuan terhadap penemuan fakta; *Basappa v Nagappa* AIR 1954 SC 440, *Dharangadhra Chemical Works Ltd v State of Saurashtra & Ors* AIR 1957 SC 264 diikut (lihat ms 4C–D, E).

(2) Selepas membaca award Mahkamah Perusahaan, mahkamah tersebut adalah berpuas hati bahawa tribunal tersebut tidak melampaui batasan yang diperuntukkan oleh writ dengan prinsip-prinsip yang didasarkan dengan keputusan-keputusan mahkamah atasan menentukan peranannya di dalam perkara aktiviti manusia. Mahkamah Perusahaan juga menanyakan soalan yang betul, mengambil kesemua fakta-fakta yang relevan dan mengecualikan dari ruang lingkupnya semua pertimbangan yang tidak relevan (lihat ms 5A–B).]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 135–306.

Cases referred to

Amanah Butler (M) Sdn Bhd v Yike Chee Wah [1997] 1 MLJ 750 (refd)

Basappa v Nagappa AIR 1954 SC 440 (folld)

Dharangadhra Chemical Works Ltd v State of Saurashtra & Ors AIR 1957 SC 264 (folld)

Hariprasad v Divelkar 1957 SC 121 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20(1)

Appeal from: Originating Motion No R2–25–8 of 1994 (High Court, Kuala Lumpur)

N Sivabalah (*Shearn Delamore & Co*) for the appellant.
Loy Chee Say (*Danker & Co*) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): This is an appeal against the judgment of Azmel J in refusing to issue an order of certiorari to quash the award of Industrial Court which was handed down on 23 December 1993.

The facts relevant to the appeal are as follows.

The respondent was initially employed as a fitter by the appellant in August 1961. He was later appointed as salesman. In a retrenchment exercise in September 1977, the respondent was discharged, in January 1978, the respondent was re-employed as a bill-collector. On 24 October 1989, the appellant wrote to the respondent, informing him that he was being retrenched as bill-collector and offering retrenchment benefits of about RM27,000. The respondent did not accept the offer. He claimed that the retrenchment was a dismissal disguised as a redundancy exercise.

He, therefore, took advantage of s 20(1) of the Industrial Relations Act 1967 ('the Act') and lodged a complaint with the Director General of Industrial Relations. In due course, after the conciliation mechanism provided by s 20 of the Act had been exhausted, the respondent's representations were referred by the Minister of Human Resources to the Industrial Court. The axis of the dispute between parties in that court was whether the respondent had been, as alleged by him, dismissed without just cause or excuse or whether his discharge was within the exercise of the bona fide managerial power vested in the appellant as employer.

The Industrial Court, after hearing evidence of several witnesses, came to the conclusion that the respondent was victimized for his trade-union activities. The Chairman of the Industrial Court was much impressed by

evidence of circumstances which went to show that the appellant was attempting to find all sorts of reasons to evict the respondent from employment. I use the expression 'evict' because of the decision of this Court in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 (where leave to appeal was refused by the Federal Court) and that of the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 which recognize that an employee's right to work and earn a living, apart from being a fundamental right, is also akin to property.

Before us, Mr Sivabalah, with his usual meticulous care, has taken us through several passages in the testimony of the witnesses who gave evidence in the Industrial Court. He has attacked the learned judge's refusal to issue certiorari on a number of grounds. I find it, however, unnecessary to delve into each of them. Suffice to say that the complaints made by Mr Sivabalah amount to a criticism of the findings of fact made by the Industrial Court based upon the credibility of the witnesses it saw and heard.

It is well-settled that a court cannot utilize certiorari proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact. If authority is needed for that proposition, it may be found in the decision of the Indian Supreme Court in *Basappa v Nagappa* AIR 1954 SC 440 and in *Dharangadhra Chemical Works Ltd v State of Saurashtra & Ors* AIR 1957 SC 264.

In response to this proposition, Mr Sivabalah refers us to the decision of this court in *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750 and the decision of the Federal Court in *Chandran*. I am conscious of the inroad made by these decisions in the field of administrative law. The principle they establish is that when a decision of an inferior tribunal is attacked in public law proceedings for unreasonableness, the inquiry extends to the merits of the decision itself.

The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in *Rama Chandran* and *Amanah Butler* may be, it does not include the review, in certiorari proceedings, of findings of fact based on the credibility of witnesses.

We are therefore in agreement with the learned judge's refusal to a domain expressly reserved by law to the Industrial Court. The issue before that court was whether there was a genuine retrenchment exercise vis~a~vis the respondent. Retrenchment means: 'the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action' (per SK Das J in *Hariprasad v Divelkar* 1957 SC 121 at p 132).

Whether the retrenchment exercise in a particular case is bone fide or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organize his business in the manner he considers best. So long as that managerial power is exercised bona fide, the decision

A is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact bona fide.

[Having carefully read the award of the Industrial Court, I am satisfied
B that that tribunal did not traverse beyond the ambit prescribed by writ by the principles established by the decisions of our superior courts specifying its role in this area of human activity. I am satisfied that the Industrial Court asked itself the right question, that it took into account relevant facts and that it excluded from its purview all irrelevant considerations. In other words, it did not commit any '*Anisminic* error' in the sense in which I used
C that phrase in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317. On the contrary, I find the decision of the Industrial Court to be in accordance with law and meritorious.]

In my judgment, the learned judge is entirely correct in refusing to issue certiorari. For these reasons I find it unnecessary to call upon Loy Chee Say to respond to the arguments of Sivabalah.
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I would therefore dismiss this appeal with costs, affirm the order of the learned judge, direct that costs of the appeal be borne by the appellant and that the deposit be awarded to the respondent to account of taxed costs.

Abu Mansor Ali JCA:

E I agree that this appeal should be dismissed for the reasons given by my learned brother.

Denis Ong JCA:

F I concur.

Appeal dismissed.

Reported by Jafisah Jaafar

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